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'Not a Question of Theology'? Religions, Religious Institutions, and the Courts in India

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Abstract

Courts have played an important role in defining the relationship between religions and the state in India. Litigation by or against religious institutions has obliged the judiciary to engage in quasi-theological reasoning in order to determine what is 'religious', and therefore beyond state control, and what is 'secular', and therefore subject to government regulation. In pre-colonial India, religious conflicts were settled by means of local arbitration or by the threat or fact of violence. After British legal institutions were established, groups and individuals learned to use the courts to settle such conflicts. This tendency to seek legal solutions to religious disputes has continued in independent India. Since the state tends always to seek an increase of its powers, courts frequently decide such cases to the detriment of the litigants. Examples studied include the *Maharaj Libel Case* (1862), the *Ramakrishna Mission Case* (1995), and the *Sri Aurobindo Society Case* (1982).

Legal conflicts involving religion are among the most difficult for courts to solve, because they occur at the meeting point of finite human needs and claims of superhuman agency. In states where there is no established religion, and where universal human rights are acknowledged, religious law is subordinated to civil law, and it falls to legislators and judges to determine the place of religion in civil life. Despite recent judicial tendencies to refrain from defining religion, particularly in pluralistic societies, judges still 'often have to decide what "religion" means for legal purposes', as Ronald Dworkin noted in *Religion without God*, citing cases where the United States Supreme Court had to decide whether individuals who were not members of theistic religions qualified for religious exemptions or rights.[1]

In this essay, I examine three cases in which courts in colonial and post-colonial India examined the meaning and scope of religion. The judgments in

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1 Ronald Dworkin, *Religion without God* (Harvard University Press, 2013) 4.

these cases helped determine the relationship between the country's secular legal system and its diverse religions. The first, the *Maharaj Libel Case*, was tried by the Supreme Court (later known as the High Court) of Bombay at the beginning of British imperial rule. The other two, the *Ramakrishna Mission Case* and the *Sri Aurobindo Society Case*, were tried by the Supreme Court of India more than a century later. In each instance, the cause of litigation was a secular problem, but the conflict was presented to the courts in religious terms. This obliged the courts to engage in quasi-theological reasoning in order to decide the cases.

Before taking up the *Maharaj Libel Case*, I will look briefly at the legal situation in India before and after the British Crown took over the administration of its Indian possessions in 1858. In traditional Indian societies, people customarily relied on local institutions—caste councils, guild councils, *panchayats* and so forth—to settle public disputes. Such institutions provided rough-and-ready justice but were subject to manipulation. Council members could be bought off or otherwise influenced by one or more of the contending parties. The use of intimidation and violence was not uncommon.[2] Even if the councils were fair, their decisions were sometimes arbitrary and inconsistent. As scholar Richard W Lariviere observed: 'in different cases nearly identical facts might result in radically different verdicts without any sense of failure or injustice on the part of the participants or the administrators.'[3]

When the British East India Company became the leading power in the subcontinent, its officials found this situation intolerable. From the early 1770s, Company administrators attempted to establish a more consistent and equable system, similar to English common law, but incorporating changes required in a country where the personal conduct of members of different groups was regulated by the customs and scriptures of different religions. It was comparatively easy to formulate a system of Muslim law, since all schools of Muslim jurisprudence (*madhahib*) are based on a single scripture and acknowledged ancillary texts, and are interpreted by an established class of legal scholars. The laws of the religious groups that became known collectively as Hinduism during the nineteenth century do not have such a uniform basis. Texts drawn upon by Hindu legal experts are divided broadly into *sruti*, or scripture, and *smriti*, or traditional texts. Among the latter are a class of writings known collectively as *dharmashastra*, 'the science of the *dharma*'. Such texts were often used as the basis of adjudication in traditional courts, but, as Lariviere pointed out, 'Fami-

2 Bernard S Cohn, 'From Indian Status to British Contract' (1961) 21 *Journal of Economic History* 616; MN Srinivas, 'The Dominant Caste in Rampura' (1959) 61 *American Anthropologist* (new series) 4–7.

3 Richard W Lariviere, 'Justices and Panditas: Some Ironies in Contemporary Readings of the Hindu Legal Past' (1989) 48 *Journal of Asian Studies* 760.

lies, castes, guilds, villages, and kings all had their respective jurisdictions' and their own *dharmashastras*.[4] Hoping to make a selection of such texts the basis of a system of Hindu personal law, Company officials assigned European scholars to translate some of them with the help of native experts. The idea was to 'eliminate what were seen as uncertainties and inconsistencies of the traditional Hindu legal system—to eliminate the vagaries of the *pandita* and replace them with the precedents of the judge', yet the British had to depend on Hindu *pandits* not only for translation but also for the interpretation of the texts in court. This proved to be a frustrating experience. Even so sympathetic an observer as Sir William Jones could write in 1788: 'I could not with an easy conscience, concur in a decision, merely on the written opinion of native lawyers, in any case in which they could have the remotest interest in misleading the Court.'[5]

Fifty years later, British officials were still concerned about the problem of consistency in Indian courts, in criminal as well as in personal law. In 1833, Parliament empowered Thomas Babington Macaulay to draft a criminal code for the Company's Indian possessions. His approach to the subject is summed up in a famous statement of that year: 'The principle is simply this; uniformity when you can have it; diversity when you must have it; but, in all cases certainty.' Twenty-nine years later, Macaulay's code was enacted by the British Parliament, and by 1882 'India's commercial, criminal and procedural law was completely codified'.[6]

The Revolt of 1857 (formerly known as the Sepoy Mutiny) demonstrated to the British that it was in their interest to avoid doing or saying anything that might offend the religious sensibilities of their Indian subjects. In a celebrated pronouncement of 1858, Queen Victoria said: 'We declare it to be our royal will and pleasure that none be in anywise favoured, none molested or disquieted, by reason of their religious faith or observances, but that all alike shall enjoy the equal and impartial protection of the law.'[7] But it was impossible, given the interplay of the religious and the worldly in everyday Indian life, for British judges to avoid taking up matters of religion altogether.

4 *Ibid*, 760.

5 Jones cited *ibid*, 761.

6 David Skuy, 'Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century' (1998) 32 *Modern Asian Studies* 513, 517.

7 Victoria of the United Kingdom, *Proclamation by the Queen in Council, to the Princes, Chiefs, and People of India* (1858), http://en.wikisource.org/wiki/Queen_Victoria%27s_Proclamation.

THE *MAHARAJ LIBEL CASE*

The most famous case in which Hinduism was scrutinised by a British colonial court was a libel suit. On 21 October 1860, a journalist and reformer named Karsandas Mulji published an article entitled 'The Primitive Religion of the Hindus and the Present Heterodox Opinions' in a Gujarati newspaper. In the article Mulji argued that the Vallabhacharya Sampradaya, a sect based on the teachings of a revered sixteenth-century Vaishnava Brahmin, was not a true branch of Hinduism but a heretical cult. To support his claim, Mulji quoted from a Sanskrit commentary on a Vallabhacharya text in which the writer recommended that a newly wedded man 'should before having himself enjoyed his wife make an offering of her' to his 'Maharaja' or guru. 'Acting up to that commentary', Mulji asserted, Maharajas 'defile the wives and daughters of [their] devotees'. He also asserted that a certain Vallabhacharya guru named Jadunathji Maharaj ought to abjure the quoted text, and 'personally adopt a virtuous course of conduct' in order to serve as a good example to other Maharajas.[8]

Jadunathji Maharaj was incensed by this article, the more so because Mulji was by birth a member of the Vallabhacharya sect. The traditional punishment for the sort of offence that Mulji had committed was outcasting, resulting in social and economic isolation. Jadunathji would have had no difficulty in getting the heads of the Bania caste to which Mulji belonged to agree to such a course.[9] Instead he chose to go the British courts. It is not known for sure why he did so. He may have realised that outcasting would have little effect on Mulji, since the journalist had left the sect voluntarily and had many supporters in the cosmopolitan world of Bombay (now known as Mumbai). He may have been attracted by the prestige of the colonial power, and may have expected the judiciary to side with him, since it had a reputation for supporting established authority.[10] Whatever the reason, Jadunathji filed a plaint in the Supreme Court of Bombay on 14 May 1861, asking for damages of fifty thousand rupees, then a considerable amount.

Although the guru had gone to the British courts, his supporters did not abandon traditional methods of influencing arbitration. Learning that certain members of the Bhattia caste were likely to give evidence that would harm Jadunathji's case, nine Bhattia leaders called a meeting where it was announced that any Bhattia who gave testimony against the guru 'would be called to

8 *Report of the Maharaj Libel Case, and of the Bhattia Conspiracy Case Connected with It* (Bombay Gazette Press, 1862) 1–3.

9 Theodore Goldstucker, *Literary Remains of the Late Professor Theodore Goldstucker*, vol II (WH Allen, 1879) 52.

10 David L Haberman, 'On Trial: The Love of the Sixteen Thousand Gopees' (1993) 33 *History of Religions* 45–46.

account according to the rules of the caste', in other words excommunicated.[11] Unfortunately for these leaders, 'the rules of the caste' were now subordinate to British law. The nine men were charged with conspiracy, convicted, and fined significant amounts.

The trial of the libel case began on 25 January 1862, and lasted almost three months. Jadunathji's lawyer called a number of witnesses who testified that he was a legitimate religious authority and a man of good character. Jadunathji himself asserted the same in his plaint and under examination. He held no heterodox opinions, he said, and had engaged in no improper conduct. Counsel for the defence spent a fair amount of time trying to undermine these claims in order to show that the statements made by Mulji in his article were true and justified, and therefore not libellous. Doctors testified that Jadunathji had sought help, through intermediaries, for a condition that they believed was syphilis. Mulji said under oath: 'The adulteries of the Maharajs are a matter of notoriety.'[12] But none of this was first-hand evidence.

The defence spent much of its time examining various texts of the Vallabhacharya Sampradaya. Presenting himself as an authority on the literature of the sect (an unusual thing for an apostate to do), Mulji discussed a number of Vallabhachari works. He was followed on the stand by John Wilson, an Indologist and Presbyterian missionary, who condemned the Vallabhacharya sect, a modern creation, as 'impure'. Asked about the sect's gurus, Wilson declared that they might be 'looked upon as preceptors, but not as preceptors of the Hindu religion'.[13]

By this time it was becoming clear that the trial was not so much about Mulji's article or Jadunathji's alleged misbehaviour, but rather about Hinduism, in particular the worship of Krishna, as perceived by nineteenth-century British Protestants. The court conceded that it was 'obviously impossible to form anything like an adequate judgement of any religious system on any mere series of extracts'. Nevertheless, it was evident that both judges on the bench had their own ideas about what Hinduism was or ought to be. Justice Joseph Arnould wrote in his judgment that the Vallabhacharya sect was a degradation of 'the sublime Brahminical doctrine of union with "*Brahm*"'.[14] He thus gave legal sanction to the philosophical conception of Hinduism that had recently been brought to the forefront by European and Indian Orientalists, and at the same time condemned a form of popular worship that was practised by thousands of people in the Bombay Presidency. Turning from doctrine to practice, both

11 *Report of the Maharaj Libel Case Libel Case* (n 8) 30.
12 *Ibid*, 93–123.
13 *Ibid*, 124–8.
14 *Ibid*, 213.

judges were convinced that the Maharajas in general, and Jadunathji in particular, took advantage of the opening provided by the cult's teachings to engage in illicit sex. They accordingly found that Mulji's article was not libellous, and made Jadunathji pay the expenses of the trial.

In his closing remarks, Justice Arnould insisted that it was 'not a question of theology that has been before us! it is a question of morality', adding, 'what is morally wrong cannot be theologically right'. When practices that 'involve a violation of the eternal and immutable laws of Right' gain 'the sanction of Religion, they ought, for the common welfare of Society, and in the interest of Humanity itself, to be publicly denounced and exposed'.[15] It would have been difficult for Arnould, in the middle of the Victorian era, to reflect that his 'eternal and immutable laws of Right' were simply norms endorsed by nineteenth-century Englishmen. Which is not to suggest that all nineteenth-century Indians approved of the behaviour of the Maharajas. In 1855, the Bhattia caste had passed a resolution restricting the hours when girls could visit the Maharajas' temples, so that 'they might not have carnal intercourse with the Maharaj'.[16] This traditional solution proved ineffective, so it was left to untraditional reformers such as Karsandas Mulji to air the question in the public press and, when necessary, defend their claims in British courts.

THE CONSTITUTION AND THE SUPREME COURT ON RELIGION

The Indian freedom movement began around a quarter of a century after the *Maharaj Libel Case*. Religion played a complex and controversial role during the struggle, with religious and caste groups frequently at odds with one another. When delegates to the newly independent country's Constituent Assembly met to write its constitution, they trod very lightly when the subject of religion came up. The new state, it was generally agreed, would be 'secular', but there was much debate about whether it should be a 'no-concern' secularism, as in the West, or an 'equal respect' secularism that was regarded by many as more suitable to Indian conditions.[17] In the end, the word 'secular' was not mentioned in the original document. (It was later included as part of the Constitution (Forty-Second Amendment) Act 1976.)

15 *Ibid*, 233–4.

16 *Ibid*,109, 206.

17 KG Balakrishnan, 'Individual Rights in India: A Perspective from the Supreme Court' (2009), http://supremecourtofindia.nic.in/speeches/speeches_2009/presentation_at_roundtable_-_university_of_georgia.pdf.

The Constituent Assembly wanted a constitution that was recognisably Indian. But when it came to formulating the country's legal system, Indian lawmakers were happy to keep what the British had given them. No one, not even a Gandhian or a Hindu traditionalist, came forward as a spokesman for 'a restoration of *dharmasastra*, nor for a revival of local customary law',[18] and Macaulay's penal code was retained with a few modifications.

The Indian Constitution guarantees the right to freedom of religion in two articles. The first, Article 25, grants freedom of conscience and worship to all; the second, Article 26, grants religious denominations the right to manage their own religious affairs, to own and administer property, and to establish institutions. Two other articles guarantee cultural and educational rights to religious, linguistic and other minorities. The second of these, Article 30, gives such minorities the right to open and administer their own educational institutions. These various articles presuppose the concept of religion, but nowhere in the Constitution are the terms 'religion' or 'religious denomination' defined. This gave room to various groups to claim the protections offered to religious denominations and minorities, leaving it to the courts to determine whether these claims were legitimate.

The Supreme Court of India dealt with such matters in a series of landmark cases between 1954 and 1966. In the first, *Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (1954), the *mahant* (head) of a *mutt* (monastery) in the erstwhile state of Madras challenged the state's Hindu Religious and Charitable Endowments Act as infringing Article 26. In its judgment, the Court approved a major portion of the Act, confirming the state government's oversight of the secular affairs of the thousands of temples, monasteries, and other religious institutions in its territory.[19] But the Court recognised that Article 26 gave religious denominations the right to manage their own affairs in 'matters of religion'. To help determine what such matters were, the Court formulated working definitions of the terms 'religion' and 'religious denomination'. Though it was 'hardly susceptible of any rigid definition', Justice BK Mukherjea wrote for the Court, 'religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being'. In addition, most religions were concerned with matters of practice, such as 'rituals and observances, ceremonies and modes of worship'. A 'religious denomination' was 'a religious sect or body having a common faith and organisation

18 Marc Galanter, 'The Aborted Restoration of "Indigenous" Law in India' (1972) 14 *Comparative Studies in Society and History* 55.

19 Ronojoy Sen, 'Legalizing Religion: The Indian Supreme Court and Secularism' (2007) 30 *Policy Studies*, www.eastwestcenter.org/fileadmin/stored/pdfs/PS030.pdf.

and designated by a distinctive name'; denominations should have 'complete autonomy' in determining what practices were essential to them. In addition Mukherjea wrote: 'What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself.'[20]

In subsequent cases, the Court returned often to the idea of essential practices, making it a touchstone for determining what was religious, and thus protected by Article 26, and what was secular, and thus subject to state control.[21] Justice JB Gajendragadkar, an activist judge with Nehruvian socialist leanings, wrote in *Durgah Committee, Ajmer v Syed Hussain Ali* (1961) that it was necessary to limit the autonomy of religions to decide what was essential to them, 'otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26'. It was the prerogative of the Court to determine what were the essential features of a given religion and what were 'extraneous and unessential accretions'.[22]

Several cases that were referred to court around this time had to do with the fraught question of the exclusion of untouchables from Hindu temples. In *Sri Venkataramana Devaru v State of Mysore* (1958), the Brahmin custodians of a temple in southern India argued that their community's traditional right to determine who could enter was protected by Article 26. The Court allowed that if the case was to be decided solely with reference to that article, a law requiring that the temple be opened to untouchables violated the Brahmins' freedom to determine their own religious affairs. But the Court added that Article 25(2)(b) affirmed that the right to religious freedom could not interfere with any law that opens temples to all sections of Hindus, and asserted that in the case before it Article 26 had to be read as subject to Article 25(2)(b).[23] Untouchables were therefore given the right to enter the temple. At the same time, the Court recognised that questions of ceremonial law were matters of religion, and so allowed the temple custodians to determine who could enter the shrine during certain special ceremonies. In this case, as in *Durgah Committee*, the Court restricted the 'complete autonomy' that the *Shirur Mutt* decision had given to religious denominations to determine what was essential to them, but it also affirmed,

20 *Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (1954): 1954 AIR (All India Reporter) SC 282, 1954 1 SCR 1005. (Note: Indian Supreme Court judgments accessed via the government's Judgment Information System, http://judis.nic.in/supremecourt/chejudis.asp; the legal search engine Indian Kanoon www.indiankanoon.org provides clearer citations and better transcripts of the judgments.)

21 Sen (n 19) 9.

22 *Durgah Committee, Ajmer v Syed Hussain Ali and Others* (1961): 1961 AIR 1402, 1962 SCR (1) 383.

23 CJ Fuller, 'Hinduism and Scriptural Authority in Modern Indian Law' (1988) 30 *Comparative Studies in Society and History* 225.

in the words of legal scholar Marc Galanter, that 'what were matters of religion depended on the historically grounded self-estimate of the group in question'.[24]

This power of self-estimate was undermined eight years later by a different Supreme Court bench in *Sastri Yagnapurushadji v Muldas Bhundardas Vaishya* (1966). This case also concerned the question of temple entry. Members of the Swaminarayan Sampradaya, known as Satsangis, sought protection from the Bombay Temple Act of 1947 by presenting themselves as members of a separate religion, distinct from Hinduism, which was therefore not subject to the provisions of Article 25(2)(b). JB Gajendragadkar, now Chief Justice, found this claim to be 'entirely misconceived'. Swaminarayan was a follower of the eleventh- to twelfth-century sage Ramanuja, and Ramanuja certainly was a Hindu. The larger question remained: What is Hinduism? To help pin this down, Gajendragadkar turned to various modern scholars, notably S Radhakrishnan (an Oxford academic who became the second president of India), to arrive at 'certain broad concepts which can be treated as basic'. Having done so to his satisfaction, he asserted that the Satsangis' fears about the pollution of their temple by untouchables was 'founded on superstition, ignorance and complete misunderstanding of the true teachings of the Hindu religion and of the real significance of the tenets and philosophy taught by Swaminarayan himself'.[25]

These four cases of the 1950s and 60s, along with one or two others, set the pattern for the Supreme Court's handling of questions of religion in later cases. Its decisions had important practical effects. By interpreting the significance and scope of Articles 25 and 26 of the Constitution, the Court helped to fix the legal relationship between the Indian state and the religions practised within its borders. The Constitution guaranteed freedom in matters of religion, but put limits on how religious bodies could conduct their outward affairs. The fundamental problem, as Justice Mukherjea wrote in *Shirur Mutt*, was to determine 'where is the line to be drawn between what are matters of religion and what are not'.[26] Subsequent judges struggled with this question, and subsequent petitioners struggled to formulate their claims in such a way as best to obtain the benefit of constitutional protections and established judicial precedents.

All the cases discussed above originated in conflicts between religious bodies and the state or agencies of the state. The religious bodies railed against the operation of laws that denied them traditional rights and privileges. The state insisted on the legitimacy of the laws in the name of the public good. The Constitution had altered the balance of power between institutions, the state

24 Marc Galanter, 'Hinduism, Secularism, and the Indian Judiciary' (1971) 21 *Philosophy East and West* 474.

25 *Sastri Yagnapurushadji and Others v Muldas Bhundardas Vaishya and Others* (1966): 1966 AIR SC 1119, 1966 SCR (3) 242.

26 *Shirur Mutt* (n 20).

(which was granted general oversight over institutions), and the citizens of the country (who were granted equal rights without regard to status). Before its promulgation, custodians of religious institutions who were challenged by disadvantaged groups could threaten the latter with severe social sanctions or violence to preserve the status quo. Now they had to go to the courts and make their claims in terms of judicial discourse.

In adjudicating such matters, the Supreme Court of India found itself obliged to act as an authority on religious affairs even though it was an agency of an avowedly secular state. The irony of this situation has not been lost on certain scholars, who have pointed out that the Court has often acted like a traditional *pandit* or *kazi*, citing scriptures of various sorts and expounding their meaning.[27] Some scholars have worried that the Court, by setting itself up as a religious authority, has overstepped its proper role. According to Ronojoy Sen, 'the Court has through its rulings consistently sought to homogenize and rationalize religion and religious practices, particularly of Hinduism', thus enabling the Indian state to push 'its reformist agenda at expense of religious freedom and neutrality'.[28] Others viewed the Court's role in a more positive light. KG Balakrishnan, Chief Justice of the Supreme Court between 2007 and 2010, asserted that the Indian judiciary 'plays a balancing game between the competing claims of governmental action and religious liberty (of individuals or groups) by expounding on a fairly complex understanding of "secularism"'.[29]

THE *RAMAKRISHNA MISSION CASE*

In the *Satsangi* case, the Swaminarayan Sampradaya tried to keep its temples closed to untouchables by claiming that it was not a part of Hinduism. In denying this claim, the Supreme Court formulated such an encompassing definition of Hinduism that it became all but impossible for any sect founded on Hindu scriptures to win approval as a separate religion.[30] In 1971, the Court ruled against a college run by the Arya Samaj (a Hindu reform group), which claimed that the Samaj was a minority religion in order to obtain the protection granted to such religions under Article 30 of the Constitution.[31] Nine years later, the Ramakrishna Mission, a group founded by the Hindu monk Swami Vivekananda (1863–1902), tried a similar strategy in an attempt to solve a problem relating to the administration of one of its colleges. At first the Mission was

27 Lariviere (n 3) 757, 767; Fuller (n 23) 246; Sen (n 19) 10.
28 Sen (n 19) 6.
29 Balakrishnan (n 17) 2.
30 Fuller (n 23) 228, 236.
31 Balakrishnan (n 17) 21.

successful, but when the case was heard by the Supreme Court in 1995, the Court ruled that the teachings of Vivekananda and his guru Sri Ramakrishna (1836–86) did not constitute a minority religion, and were therefore not entitled to protection under Article 30.

The Ramakrishna Mission was founded in 1901 by Vivekananda and other disciples of Ramakrishna in order to promote Ramakrishna's teachings and the practices associated with them. Since that time, the Mission has been active in setting up and running educational institutions. In independent India, its schools and colleges have benefited from government funding, but the Mission has tried to keep them true to the spirit of Ramakrishna and Vivekananda. One way it did this was to appoint the principals of its schools and colleges.

In 1978, the government of the state of West Bengal (which then was ruled by a coalition of Marxist and other left-wing parties) made it known that it intended to play a larger role in the constitution of governing bodies of schools and colleges supported by government funds. Two years later, the teachers of the Vivekananda Centenary College at Rahara, West Bengal, which had been built with government funds on land owned by the Mission, protested against the appointment of a new principal who had been nominated by the Mission. There were other questions at issue as well, including the teachers' salaries and benefits.[32] The teachers' council took over the management of the college and appointed its own principal. In response, the Mission initiated a civil suit. The teachers then filed a writ petition before the High Court of Calcutta.

The Mission's lawyers suggested that it respond to the writ petition under the terms of Article 30, which guarantees religious minorities the right to found and administer their own educational institutions. Minority-religion institutions have more control over administrative and faculty appointments and student admissions than Hindu institutions, which enjoy only the freedoms granted under Article 26.[33] The Mission agreed with the lawyers' strategy, and several member monks swore an affidavit in which they declared that they were adherents of 'Ramakrishnaism', a religion based on the Hindu Vedanta philosophy but distinct from Hinduism itself. They did so not to make a theological claim but to respond pragmatically to a specific legal challenge; yet their action had far-reaching consequences in the theological as well as the pragmatic sphere.[34]

32 Brian K Smith, 'How Not to Be a Hindu: The Case of the Ramakrishna Mission' in Robert D Baird (ed), *Religion and Law in Independent India* (Manohar, 1993) 338.

33 Sanjeev Nayyar, 'Why Did the Ramakrishna Mission Say they Are Not Hindus?', esamskriti.com (2002), www.esamskriti.com/essay-chapters/Why-did-the-Ramakrishna-Mission-say-they-are-not-Hindus-1.aspx.

34 MD McLean, 'Are Ramakrishnaites Hindus? Some Implications of Recent Litigation on the Question' (1991) 14 *South Asia* 100; Gwilym Beckerlegge, *The Ramakrishna Mission: The Making of a Modern Hindu Movement* (Oxford University Press, 2000) 62.

The case was heard by a single judge of the Calcutta High Court, who dismissed the teachers' writ petition, affirming that schools and colleges run by the Ramakrishna Mission were entitled to protection under Article 30(1). The teachers appealed this decision, and the case was heard by a Division Bench of the High Court, which 'expressed its agreement with the learned single Judge that the Ramakrishna Mission comprised of followers of Ramakrishna, being a minority based on religion, was protected under Article 30(1) of the Constitution'.[35]

The Mission had apparently won the case, but it produced a split in the Ramakrishna community. Many lay devotees of Ramakrishna and Vivekananda were shocked to learn that, in legal terms, they now belonged to a religion that was not a part of Hinduism. Some of them joined the teachers of the Rahara college in their litigation. There was also conflict within the Mission itself, and the general secretary, Swami Hiranmayananda, was forced to step down.[36]

The teachers and associated lay devotees appealed the decision of the High Court in 1985. The case, *Bramchari Sidheswar Shai and Others v State of West Bengal*, was not heard by the Supreme Court until 10 years later. The main point for decision was whether the teachings of Ramakrishna and Vivekananda constituted a separate religion. The Mission's lawyers argued that while 'Ramakrishnaism' included the 'basic virtues of Hinduism' it did not 'exhaust itself in the Hindu Religion'. It was based not so much on the Vedas as on the experiences of Sri Ramakrishna, who had practised the spiritual methods of several different religions. His disciple Swami Vivekananda had gone to Chicago in 1893 to represent Hinduism at the World Parliament of Religions, but had later become the champion of a new universal religion based on Vedanta though not confined to it.[37] The lawyers for the teachers argued that Ramakrishna and Vivekananda did not set out to found a new religion, but rather strove to 'renew and revitalize' Hinduism. But unlike Buddha and Mahavira, the founders of Buddhism and Jainism, they never challenged the Vedic basis of the Hindu religion. Their goal was to 'recall Hindus to their true faith and so to reform it'.[38]

The Supreme Court delivered its judgment on 2 July 1995. Basing itself on the broad definition of Hinduism found in *Yagnapurushadji*, and making extensive use of the sayings of Ramakrishna and the writings of Vivekananda, the judges found that it would be a 'travesty of truth to say that Ramakrishna created a religion independent, distinct and apart from Hindu religion and called

35 Cited in *Bramchari Sidheswar Shai and Others v State of West Bengal* (1995): 1995 AIR 2089, 1995 SCC (4) 646.

36 McLean (n 34) 114.

37 *Ibid*, 104.

38 Beckerlegge (n 34) 63.

it a universal religion'. Indeed Justice N Venkatachala, writing for the Court, asserted that Hinduism, 'being inclusive and broad enough to include all the ideals of all religions in the world', was itself the universal religion. The teachings of Ramakrishna and Vivekananda were flowers of the Hindu religion. The movement based upon those teachings was not a minority religion but a denomination of Hinduism as the term denomination was defined in *Shirur Mutt*. The Ramakrishna Mission and its schools and colleges were therefore not entitled to the protection accorded to minority religions by Article 30(1). However, the Court permitted the Mission to appoint the principal of the college at Rahara by virtue of a special exception made by the Government of West Bengal to its order of 1978.[39]

THE *SRI AUROBINDO SOCIETY CASE*

In the cases involving the Swaminarayan Sampradaya, the Arya Samaj and the Ramakrishna Mission, a religious institution tried to convince the judiciary that it was not a Hindu denomination in order to escape from some form of state control. In each case, the Supreme Court denied the claim. In the *Sri Aurobindo Society Case* (*SP Mittal Etc Etc v Union of India and Others*, 1982), an association that had been founded on a non-religious basis tried to convince the judiciary that it *was* a religion in order to prevent the state from taking over one of its projects. The claim made by the Sri Aurobindo Society (SAS) was quite different from that made by the three religious institutions, but the end result was the same. In rejecting the claim, the Supreme Court affirmed the state's right to control the outward affairs of an institution.

The project in question was Auroville, an international community founded in 1968 by the Mother (Mira Alfassa, 1878–1973), the French-born collaborator of the Indian philosopher and spiritual leader Sri Aurobindo (1872–1950). Forty-two years earlier, the small group of disciples who had gathered around Sri Aurobindo took the form of the Sri Aurobindo Ashram, and the Mother became its active head. Sri Aurobindo made it clear from the beginning that the Ashram was not a religious institution, but a place of spiritual practice. As he wrote (in the third person) in 1934:

> The Asram is not a religious association. Those who are here come from all religions and some are of no religion. There is no creed or set of dogmas, no governing religious body; there are only the teachings of Sri Aurobindo and certain psychological practices of concentration and meditation, etc., for the enlarging of the conscious-

39 *Bramchari Sidheswar Shai and Others v State of West Bengal* (1995): 1995 AIR 2089, 1995 SCC (4) 646.

> ness, receptivity to the Truth, mastery over the desires, the discovery of the divine self and consciousness concealed within each human being, a higher evolution of the nature.[40]

The Ashram grew steadily during the 1930s and 40s, and continued to grow even after the death of Sri Aurobindo in 1950. By the 1960s, the Mother decided that another community, 'more exterior' than the Ashram, but still devoted to spiritual practice, was needed.[41] She called this community-to-be Auroville.

As the Mother conceived it, Auroville would become a city of 50,000 people spread out over some 1,600 hectares of what was, at the time, virtual wasteland. To develop it, a great deal of money was needed, and for this she turned to the SAS, an association that had been registered in Calcutta (now Kolkata) in 1960 by a group of businessmen and lawyers.[42] The SAS succeeded in collecting a significant amount of money, including some from the Government of India. The SAS also helped the government persuade the United Nations Educational, Scientific and Cultural Organization (UNESCO) to pass three resolutions commending Auroville to its member nations and to offer a small sum of money towards its development. For this and other reasons, the SAS became the *de facto* manager of the Auroville project.

Things went fairly well until 1973, when the Mother died. In the years that followed, tensions that had been developing between the SAS and the residents of Auroville increased rapidly. Around the same time, reports surfaced that the SAS was misusing money intended for Auroville. In November 1975, a group of Auroville residents registered a new body with the government called the Auroville Residents' Association. On 15 November, the chairman of the SAS filed suit in a local court for a permanent injunction against this association. In so doing, the chairman declared himself the sole proprietor and manager of the assets of Auroville. The SAS obtained the injunction, but the Residents' Association was later given partial relief from it. This permitted the body to function for some time. In the meantime the SAS had created a new trust whose stated purpose was to assist in the funding of Auroville projects, but neither this trust nor the SAS itself gave urgently needed money to the residents of Auroville. In May 1976, an independent accountant who was auditing the books of the SAS found evidence of serious irregularities.[43]

40 Sri Aurobindo, *Autobiographical Notes and Other Writings of Historical Interest* (Sri Aurobindo Ashram, 2006) 531.

41 The Mother (Mira Alfassa), *Words of the Mother* I (Sri Aurobindo Ashram, 1980) 210.

42 *Memorandum of Association and Rules and Regulations of Sri Aurobindo Society* (1960), 5.

43 Robert N Minor, *The Religious, the Spiritual and the Secular: Auroville and Secular India* (SUNY Press, 1999) 70–71.

The Aurovillians, supported by well-wishers from around the world, now petitioned the central government, then controlled by the Congress-I Party, to intervene. The Minister for Home Affairs visited Auroville in July 1976, and in December the Home Ministry set up a committee of inquiry, which confirmed instances of mismanagement and misuse of funds. But before the Congress government could do much to improve the situation, it was voted out of power in the 1977 General Election. The incoming Janata government took less interest in Auroville affairs; if anything it tilted towards the SAS. The next few years were a time of confusion and trouble in Auroville, with threats of deportation and instances of violence against residents.[44]

In 1980 the Congress returned to power, and the government resumed its attempts to settle the Auroville question. It ordered the Central Bureau of Investigation to examine the SAS's books. Satisfied that there were indeed serious irregularities, the government decided to take temporary control of Auroville's affairs. On 10 November 1980, the President of India issued the Auroville (Emergency Provisions) Ordinance, empowering the government to take over the management of the project for a limited period. Two weeks later, a bill was introduced in Parliament to give legislative form to the government takeover. After vigorous debate in both houses, the bill was passed by the Lok Sabha on 2 December and by the Rajya Sabha on 9 December as the Auroville (Emergency Provisions) Act 1980.[45]

In August 1980, three months before the Ordinance was issued, the SAS filed suit in the Calcutta High Court against the Government of India. The SAS contended that the proposed ordinance was in violation of the West Bengal Societies Registration Act 1961, and also in violation of Articles 25 and 26 of the Constitution in that the SAS and its project Auroville were religious institutions. The court granted an anticipatory injunction against the Ordinance, which however was vacated when the government appealed. The original and subsequent petitions were then transferred to the Supreme Court.

The claim that the SAS and Auroville were religious denominations was on the face of it rather weak. The Rules and Regulations of the SAS, which were signed by the Mother, stated that membership would be open to 'people everywhere without any distinction of nationality, religion, caste, creed or sex'.[46] The SAS claimed exception under the Income Tax Act not as a religion but 'on the grounds that it was engaged in educational, cultural and scientific research'.[47] Literature about Auroville issued by the SAS, and the resolutions

44 *Ibid*, 72–73.
45 *Ibid*, 75, 82–83.
46 *Memorandum of Association and Rules and Regulations* (n 42) 9.
47 *SP Mittal Etc Etc v Union of India and Others* (1983): 1983 AIR 1, 1983 SCR (1) 729.

of UNESCO, make no mention of any religious aim. The Mother, the founder of the project, spoke often against 'religion' as opposed to 'spirituality'. Many of her statements are quite clear-cut. With regard to the central meditation hall of Auroville, she said: 'NO RELIGION, no religion, no religious forms … [W]e want NO religion.'[48] It is evident that the SAS, in trying to retain control of Auroville, presented it to the Supreme Court in a way different from the way that the Mother and the SAS itself had presented it to the world since 1968.

The SAS's lawyers argued that when Sri Aurobindo and the Mother spoke against religion, they were referring to the lower form of 'religiosity' and not to 'true religion'. To support this view, they cited portions of a passage from Sri Aurobindo's *Human Cycle*: 'True religion is spiritual religion, that which seeks to live in the spirit, in what is beyond the intellect…. Religionism, on the contrary, entrenches itself in some narrow pietistic exaltation of the lower members or lays exclusive stress on intellectual dogmas, forms and ceremonies.'[49] The lawyers did not cite enough of the passage to make it clear that Sri Aurobindo equated 'true religion' with 'spirituality', that is, 'the opening of the deepest life of the soul to the indwelling Godhead', and condemned religion as generally understood, 'a creed, a cult, a Church, a system of ceremonial forms', as a potentially 'retarding force' that had to be rejected.[50]

The Solicitor General of the Government of India, and the lawyer for the residents of Auroville, also presented quotations from the works of Sri Aurobindo and the Mother that showed clearly that 'the teachings of Sri Aurobindo do not constitute [a] religion' and that the SAS and Auroville did not constitute 'a religious denomination'. In any event, they added, the Auroville (Emergency Provisions) Act of 1980 had 'taken over only the management of Auroville from the Society and does not interfere with the freedom [of religion] contemplated by Articles 25 and 26 of the Constitution'.[51]

Delivering its judgment on 8 November 1982, the Supreme Court found that there was 'no room for doubt that neither the Society nor Auroville constitute a religious denomination and the teachings of Sri Aurobindo only represented his philosophy and not a religion'. In arriving at its decision, the Court considered at length the meaning of 'religion' as laid down by the *Shirur Mutt*, *Durgah Committee*, *Yagnapurushadji* and other judgments, and examined the teachings of Sri Aurobindo in the light of these judgments 'to see whether they [Sri Aurobindo's teachings] constitute a religion'.[52] A majority of the bench was of the

48 The Mother (Mira Alfassa), *Mother's Agenda*, vol 10 (Mira Aditi Centre, 1998) 498.
49 Sri Aurobindo, *The Human Cycle* (Sri Aurobindo Ashram, 1997) 177–8.
50 *Ibid*, 177.
51 *SP Mittal Etc* (n 47).
52 *Ibid*.

opinion that they did not. The Court went on to assert that 'even assuming that the Society or Auroville was a religious denomination, clause (b) of Article 26 guarantees to a religious denomination a right to manage its own affairs in matters of religion' but gives the government broad powers in regulating its secular affairs. Auroville, the full bench declared, could not be considered 'a matter of religion'. The Court therefore rejected the petitions of the SAS, upholding the legality of the Auroville (Emergency Provisions) Act 1980.

One of the five members of the bench, Justice O Chinnappa Reddy, disagreed with his colleagues in regard to the question whether the teachings of Sri Aurobindo constituted a religion. He believed that they did, and gave his reasons in a long dissent. Reddy cited all sorts of texts, including British and American reference works and an American magazine, in an attempt to show that Sri Aurobindo was indeed a religious teacher. The fact that Sri Aurobindo insisted he was not the founder of a religion was of little importance since 'no great religious teacher ever claimed that he was founding a new religion or a new school of religious thought'. In Reddy's opinion, the question was not whether Sri Aurobindo 'refused to claim or denied that he was founding a new religion or a new school of religious thought but whether his disciples and the community thought so'.[53] The other four members of the bench were not convinced by this unusual line of argument.

As a result of the Supreme Court's decision, the SAS was obliged to cut its links with Auroville. The Government of India prolonged the validity of the Auroville (Emergency Provisions) Act by means of amendment acts in 1985 and 1987. It then made its role in Auroville permanent through the Auroville Foundation Act 1988. This made the central government 'the owner of all property and assets related to Auroville' and established a permanent Auroville Foundation in which a state-appointed governing board would have the primary decision-making role.[54] This arrangement was not what the residents of Auroville had hoped for when they went to the Government of India in 1975 for help to free themselves from the SAS, but it at least allowed the community to survive and develop.

RELIGION, RELIGIOUS INSTITUTIONS AND THE COURTS

In their own sphere, religions make assumptions about the nature of a higher or deeper reality and the relationship of this reality to human beings and the world. Most religions develop systems of thought and practice based on these

53 *Ibid*.
54 Minor (n 43) 76.

assumptions, which become more or less binding on adherents. When a single religion predominates in a region, its theology and rules of practice are often codified and imposed on everyone. The 'laws of God' and the laws of human behaviour are identified. The result is often a sort of theological totalitarianism.

In the modern world, few states impose a single religion and system of religious law on everyone. Secular legal systems have developed that are based not on religious beliefs but on abstractions such as justice, freedom and individual rights. But such systems have to take religion into consideration, because it plays an important role in ordinary life.

In 2009, KG Balakrishnan observed that 'the ambit of "religious freedom" in India has been primarily shaped by litigation rather than the internalization of constitutional rights amongst the citizenry'.[55] His statement is true not only of religious freedom but of most aspects of the relationship between religion and the law in India. In each of the cases studied here, an individual or institution went to court to obtain some worldly end: damages for libel, protection from government control of a religious institution, control of the administration of a school, and control of the development of a community. In each case, a court attempted to define religion or a specific religion (generally Hinduism), and to draw the line between religion proper and the secular affairs of religions. Not surprisingly, the courts, as agents of the state, drew the line in such a way that the portion of the state has increased.

Individuals and institutions that go to the courts must operate within their procedural frameworks. A case soon ceases to be an attempt to solve a problem on its own terms, becoming instead an attempt by the litigant to work the system to his or her advantage. Things do not always, or even often, turn out as the litigant originally planned. When Jadunathji Maharaj went to the Supreme Court of Bombay to try to humiliate and punish Karsandas Mulji, he did not reflect that he had to prove the defamatory nature of Mulji's article not to the satisfaction his followers, but in terms of the Indian law of defamation. When the leaders of the Ramakrishna Mission decided to present themselves to the courts as 'Ramakrishnaites' in order to obtain the benefits of Article 30(1), they did not realise that many Hindu devotees of Ramakrishna would rise in revolt against them. When the Sri Aurobindo Society decided to claim that it and Auroville were religious denominations, it forgot, or chose to ignore, the fact that Sri Aurobindo and the Mother asserted explicitly that they wished to have nothing to do with religion. The courts agreed with Auroville's lawyers on this, opening the way to the eventual takeover of the project by the Government of India.

55 Balakrishnan (n 17) 20.

Litigants in India who go to the courts to settle disputes that are related, directly or indirectly, to religion often oblige members of the judiciary to act as religious experts—in effect to act as theologians. It is open to question whether magistrates and judges are qualified to speak on such matters. The Constitution gives individuals and religious denominations freedom in 'matters of religion', but Indian judges have time and again been asked to determine whether a given activity of a religious institution is a matter of religion or not. In deciding such questions, judges have had to proceed without the guidance of a law of evidence in regard to religious matters. The materials that the judges in the cases discussed above cited in their judgments would not have been thought acceptable by a seminarian or a professor of religious studies in a university. In defining 'religious denomination' in *Shirur Mutt*, Justice Mukherjea relied on the 'Oxford Dictionary' (edition not specified). To define religion, he drew on what he took to be common knowledge. In *Durgah Committee*, Justice Gajendragadkar cited the *Shirur Mutt* definitions (as have almost all judges in religious cases since 1954), but also a Western history of Islam in India. The same judge, in his highly influential *Yagnapurushadji* judgment, quoted from reference works such as the *Encyclopaedia of Religion and Ethics*, and books by scholars such as S Radhakrishnan, Max Müller, Arnold Toynbee and Monier Monier-Williams. The judges in the *Ramakrishna Mission Case* and *Sri Aurobindo Society Case* used more pertinent sources: the writings of Ramakrishna and Vivekananda and of Sri Aurobindo and the Mother respectively. But for more general discussions of religion, they too fell back on various reference works. The court's preference for such works over traditional texts, and its habit of 'interpreting religious doctrine', are among the reasons why scholars such as Ronojoy Sen have criticised 'the constant attempt by the [Supreme] Court to fashion religion in the way a modernist state would like it to be rather than to accept religion as represented by its practitioners'.[56] What Sen missed here is what Gajendragadkar pointed out in *Yagnapurushadji*: religious leaders invariably represent the tenets of their sects so as to maximise the sect's immediate interests. This leads to an obfuscation of what Gajendragadkar called 'the message of social equality and justice proclaimed by the Indian Constitution'.[57] That document, which does not even define the word 'religion', has had more effect on the religious life of modern India than any other text.

56 Sen (n 19) 10.

57 *Sastri Yagnapurushadji* (n 25).